No. 06-1137

Supreme Court, U.S.
FILED
MAR 19 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RASHID ARRALEH,

Petitioner,

v.

COUNTY OF RAMSEY; TERRY ZURN, INDIVIDUALLY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUSAN GAERTNER
Ramsey County Attorney

THOMAS E. RING
Counsel of Record
Assistant County Attorney
50 West Kellogg Blvd., Suite 560
Saint Paul, MN 55102
(651) 266-3222

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether an employer may be held liable for race and national origin discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 based on the alleged discriminatory conduct of non-management, non-supervisory subordinate employees.

II. Whether the district court and court of appeals correctly applied the standard for establishing a hostile work environment claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
I. Factual Background	1
II. District Court Proceedings	2
III. Court of Appeals Proceedings	4
ARGUMENT	6
I. Arraleh Waived the Issue of Employer Liability for Adverse Employment Actions Influenced or Caused by the Discriminatory Conduct of Non-Management Employees	6
A. Arraleh Did Not Argue that Biased Conduct by Non-Management Employees Influenced the Defendants' Hiring Decisions	7
B. This Case Does Not Present Extraordinary Circumstances Sufficient to Excuse Mr. Arraleh's Waiver of this Issue	9
II. The Lower Courts Correctly Applied the Legal Standards Governing Hostile Work Environment Claims	10
A. Any Misstatement of the Hostile Work Environment Standard Is Inconsequential Because the Lower Courts Applied the Proper Legal Analysis	11

TABLE OF CONTENTS – Continued

Page

B. Even if the Lower Courts Improperly Required Conduct Be "Severe and Pervasive," a Writ of Certiorari Is Inappropriate Because the Eighth Circuit Also Found for Defendants on Alternative Grounds 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Al-Zubaidy v. TEK Indus., Inc., 406 F.3d 1030 (8th Cir. 2005) 11

Arraleh v. County of Ramsey, 461 F.3d 967 (8th Cir. 2006) 1

BCI Coca-Cola Bottling Co. v. EEOC, ___ U.S. ___, 127 S. Ct. 852 (2007) 6

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 7

Duignan v. U.S., 274 U.S. 195 (1927) 7

Gagnon v. Sprint Corp., 284 F.3d 839 (8th Cir. 2002) 7

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 11, 12

Jiles v. Ingram, 944 F.2d 409 (8th Cir. 1991) 7

Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993) 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) ..... *passim*

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 7

Vargas v. Northwest Area Found., No. Civ. 03-2490, 2004 WL 1834580, at *7 (D. Minn. Aug. 13, 2004) 3, 4

Webb v. St. Louis Post-Dispatch, 51 F.3d 147 (8th Cir. 1995) 7

STATUTES

28 U.S.C. 1254(1) 1

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 461 F.3d 967. The order of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. A43) is reported at 461 F.3d 967. The memorandum opinion and order of the district court (Pet. App. A27-A42) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The petition for rehearing and rehearing *en banc* was denied on November 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

I. Factual Background

In December 2001, Rashid Arraleh applied for a temporary, six-month job with Workforce Solutions – a Ramsey County program that assists people in finding gainful employment. After interviewing two other candidates, Terry Zurn, the supervisor of Workforce Solutions' Dislocated Worker Program, hired Arraleh for the temporary position; Patricia Brady, the director of Workforce Solutions, approved this hiring decision. Arraleh began work on December 17, 2001. Under Minnesota law and county personnel rules, this six-month position would end no later than May 31, 2002. (Pet. App. A2.)

Throughout his six-month tenure at Workforce Solutions, Arraleh failed to perform the required duties of his

position. These performance deficiencies included: (1) poor customer service; (2) failing to show up for work without notice or explanation; (3) failing to keep client appointments; (4) double-booking client appointments; (5) leaving work without signing out; and (6) inappropriate workplace behavior, including saying, for example, "Who do I have to sleep with to get service around here?" during a lunch meeting with dislocated worker clients. (Pet. App. A2-A4.)

Despite these consistent failures to meet the legitimate expectations of his temporary position, Workforce Solutions fully considered Arraleh's multiple applications for permanent employment through the County's competitive civil service hiring process, which is administered by its stand-alone Human Resources Department. When Workforce Solutions sought to fill two permanent positions in May 2002, Human Resources included Arraleh among the list of eligible candidates, and he was interviewed for the positions. Zurn ultimately hired two African-American women, who had also completed temporary positions with the agency, but who did not have the performance deficiencies exhibited by Arraleh. (Pet. App. A8-A9.)

II. District Court Proceedings

Arraleh sued Ramsey County and Zurn individually (hereinafter "Defendants"), asserting claims of: (1) failure to hire based on race and national origin discrimination; (2) hostile work environment; and (3) retaliation. Defendants, after extensive discovery by both parties, moved for summary judgment on all claims.

In his brief opposing summary judgment, Arraleh individually outlined the factual basis and legal arguments supporting each of his three claims. Regarding the

hostile work environment claim, Arraleh quoted the unpublished District of Minnesota decision in *Vargas v. Northwest Area Found.*, No. Civ. 03-2490, 2004 WL 1834580, at *7 (D. Minn. Aug. 13, 2004), for the legal standard governing such claims: "To alter the terms and conditions of one's employment, conduct must be *severe and pervasive*, both objectively and subjectively." (Arraleh's Mem. Opposing Summ. J. at 23 (hereinafter "D. Minn. Br.") (emphasis added).)

Arraleh also argued that his discriminatory hiring claim should survive summary judgment based on both direct evidence of discrimination and the inference created under the *McDonnell Douglas* burden-shifting analysis. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). As direct evidence, Arraleh cited two alleged discriminatory comments: (1) a comment by Zurn that he could not work with black men; and (2) a comment by a county manager to Zurn that hiring Arraleh would be like raising little terrorists. (D. Minn. Br. at 28-29.) Arraleh also argued that his claim should survive summary judgment under the *McDonnell Douglas* analysis because Ramsey County changed the explanation for its failure to hire him, because other employees engaged in similar conduct, and because Arraleh was better qualified than the two candidates hired. (D. Minn. Br. at 29-36.)

Arraleh's discriminatory hiring argument did not refer to any comments by his non-management co-workers (these comments were referenced only in the hostile work environment section), and did not argue that Ramsey County was liable because the biased conduct of non-management employees caused an adverse employment action – in fact, Arraleh's brief failed to cite any legal

authority relating to potential employer liability for adverse employment actions caused by non-management employee bias.

The district court granted the Defendants' motion for summary judgment. Regarding the hostile work environment claim, the district court specifically found that "Arraleh has not presented evidence that those comments were sufficiently severe or pervasive to alter the terms or conditions of his employment." (Pet. App. A40.) The district court also determined that there were no triable issues related to the discriminatory hiring claim, and expressly found that an alleged comment by Brady ("black employees are expected to leave their blackness behind") and the comments of non-management employees, all of which were referenced by Arraleh in relation to his hostile work environment claim, were not probative of pretext under the *McDonnell Douglas* analysis. (Pet. App. A37-A38.) The district court did not consider whether the evidence created a triable issue of fact regarding liability based on a theory that the bias of non-management employees caused Defendants' failure to hire.

III. Court of Appeals Proceedings

Arraleh appealed the district court's entry of summary judgment on each of his claims. In relation to the hostile work environment claim, Arraleh again quoted *Vargas* for the legal standard governing such claims: "To alter the terms and conditions of one's employment, conduct must be *severe and pervasive*, both objectively and subjectively." (Arraleh's Br. on Appeal at 21 (hereinafter "Br. on Appeal") (emphasis added).)

Arraleh also challenged the district court's finding that there were no triable issues of fact on the discriminatory

hiring claim. In his Eighth Circuit brief, Arraleh again cited two comments as direct evidence of discrimination: (1) Brady's alleged comment that black employees are expected to leave their blackness behind; and (2) the county manager's alleged comment that hiring Arraleh was like raising little terrorists. (Br. on Appeal at 27.) Arraleh also argued that his objectively better qualifications, the similar performance deficiencies by other Workforce Solutions employees, and Defendants' alleged changing explanation should have prevented summary judgment on this claim. (Br. on Appeal at 28-34.) Like his argument to the district court, Arraleh's brief to the Eighth Circuit failed to present any legal argument or authority for liability premised upon a theory that bias by non-management employees caused an adverse employment action.

The Eighth Circuit affirmed the district court's entry of summary judgment on each of Arraleh's claims (Pet. App. A21). Finding that "many of the alleged comments were wholly unrelated to Arraleh's race or national origin" and no evidence suggested that the comments interfered with his ability to perform his job duties, the court held that there was no material issue of fact on the hostile work environment claim (Pet. App. A20). Moreover, even if Arraleh had presented evidence that the harassment affected a term or condition of employment, the court concluded that the hostile work environment claim would still fail because "he did not provide evidence that the County failed to respond to the harassment in a 'prompt and effective manner.'" (Pet. App. A20-A21).

In relation to the failure to hire claim, the court held that neither Brady nor the county manager's comments were direct evidence of discrimination because there was no evidence that these comments influenced Zurn's

decision to hire other candidates (Pet. App. A11-A12). Applying the *McDonnell Douglas* analysis, the court held that "even if Arraleh, contrary to the district court's determination, did establish a prima facie case of intentional discrimination, he failed to present evidence sufficient to support a finding that the County's declared reason for declining to hire him was pretext for race and national origin discrimination." (Pet. App. A14).

Following the Eighth Circuit's affirmance of the district court, Arraleh petitioned for rehearing *en banc* and raised, for the first time in these proceedings, the issues presently petitioned for review. On November 16, 2006, the Eighth Circuit denied Arraleh's petition for rehearing *en banc* (Pet. App. A43).

ARGUMENT

I. Arraleh Waived the Issue of Employer Liability for Adverse Employment Actions Influenced or Caused by the Discriminatory Conduct of Non-Management Employees.

Arraleh asks this Court to review whether an employer may be liable for adverse employment actions caused by the discriminatory animus of non-management employees – an issue upon which this Court has already granted a writ of certiorari. *See BCI Coca-Cola Bottling Co. v. EEOC*, ___ U.S. ___, 127 S. Ct. 852 (2007). This issue was first raised in Arraleh's petition for rehearing *en banc* – it was not presented to either the district court or the Eighth Circuit. As a court of review, this Court has consistently refused to consider, absent extraordinary circumstances, issues not presented to and passed upon by

the lower courts. *E.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989); *Duignan v. U.S.*, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L.Ed. 996 (1927). Because Arraleh failed to present to the lower courts both the legal authority and the factual arguments for employer liability for hiring discrimination influenced or caused by the biased conduct of non-management employees, and because this case does not present extraordinary circumstances to excuse waiver, Supreme Court review of this issue is not warranted.

A. Arraleh Did Not Argue that Biased Conduct by Non-Management Employees Influenced the Defendants' Hiring Decisions.

In his Petition for a Writ of Certiorari, Arraleh asserts that the Eighth Circuit's opinion is "legally flawed" because Title VII creates employer liability when "biased lower level employees influenced or caused an employment decision." (Pet. 7.) As the petition correctly states, the circuits are split on whether, and under what circumstances, such liability is formed. (Pet. 7-13.) In discussing the Eighth Circuit's standard on this point of law, Arraleh cites four cases: (1) *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991); (2) *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993); (3) *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147 (8th Cir. 1995); and (4) *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002). (Pet. 12.) However, none of these cases, and no other authority applying this legal standard, were cited in Arraleh's briefs on summary judgment or on appeal.

In his brief to the district court, Arraleh argued that both Zurn and the county manager's comments constituted

direct evidence of discrimination. Arraleh also argued that the Defendants' changed explanation and his superior qualifications were sufficient to show that the Defendants' explanation was pretextual under the *McDonnell Douglas* analysis. In addition to rejecting each of these factual arguments, the district court considered and rejected two factual arguments not raised by Arraleh under his discriminatory hiring claim, finding that Brady's alleged comment and the comments of non-management employees did not show pretext.

Apparently based on the district court's analysis, Arraleh adjusted his arguments in his brief to the Eighth Circuit. He substituted the alleged comment by Brady, which the district court had raised *sua sponte*, for the alleged comment by Zurn, which the district court found was inadmissible hearsay. Arraleh again decided that the comments by non-management employees – the second facts raised *sua sponte* by the district court – did not warrant inclusion in his discriminatory hiring claim.

The opinion of the Eighth Circuit considered and rejected each of the arguments actually presented by Arraleh. The court specifically found that the record: (1) does not contain evidence that the county manager's alleged comment influenced Zurn's decision (Pet. App. A11); (2) does not provide context linking Brady's comment to the hiring decision (Pet. App. A11-A12); (3) does not suggest that the Workforce Solutions decisionmakers knew of the alleged performance deficiencies of other employees (Pet. App. A15); and (4) suggests that Defendants merely elaborated on, rather than changed, their explanation for the hiring decision (Pet. App. A15). Although Judge Heaney, writing in dissent, suggested that the biased comments by non-management employees provided sufficient direct evidence of discrimination to

survive summary judgment (Pet. App. A24-A25), this theory was neither pressed by Arraleh nor passed on by the majority.

Even after the district court *sua sponte* considered the conduct of non-management employees, Arraleh chose not to present to the Eighth Circuit the legal authority or factual arguments necessary to support this new theory. This issue was therefore waived and is not appropriate for Supreme Court review.

B. This Case Does Not Present Extraordinary Circumstances Sufficient to Excuse Mr. Arraleh's Waiver of this Issue.

Arraleh was hired to a temporary position, but hoped to use it as a six-month audition for a permanent position. Rather than working hard to exceed his employer's reasonable expectations, however, Arraleh performed substandard work. Not surprisingly, the employer chose to hire other individuals without this negative history.

In these proceedings, Arraleh has never denied his significant shortcomings. (Pet. App. A2, A5.) Rather, he asserted that other employees (who had already been hired to permanent positions) engaged in similar conduct, and thus ascribed his own failure to obtain a permanent position to the discriminatory animus of Zurn – the very person who had hired him only six months earlier. After twice failing in presenting this theory, Arraleh now attempts to ascribe his failure to the discriminatory conduct of his co-workers.[1] This issue, however, was waived when

[1] Arraleh's new theory of liability based on the discriminatory animus of his co-workers, rather than on the bias of Zurn, directly contradicts his claim against Zurn individually.

Arraleh failed to present the legal or factual support for this theory of liability to the lower courts.

In this petition, Arraleh correctly notes that the issue presented – whether, and under what circumstances, an employer may be liable for adverse employment actions influenced or caused by the bias of non-management employees – is an important legal question upon which the circuits are split. This question, however, can be adequately considered and resolved in the case in which this Court has already granted a writ of certiorari. Thus, it is unnecessary for this Court to review the present case – one in which neither the legal nor factual arguments were previously presented or developed – in order to resolve this important legal question.

Supreme Court review is intended to review the lower courts' analysis for legal errors; it is not intended to provide litigants an opportunity to present new theories and legal arguments. Arraleh has not presented any explanation for his failure to present this issue to the lower courts or extraordinary circumstances sufficient to excuse this waiver. Accordingly, Defendants respectfully request that this Court deny Arraleh's Petition for a Writ of Certiorari.

II. The Lower Courts Correctly Applied the Legal Standards Governing Hostile Work Environment Claims.

Under Eighth Circuit precedent, which Arraleh does not challenge in this petition, a plaintiff must establish five elements for a hostile work environment claim: "(1) he is a member of a protected class; (2) he was exposed to unwelcome harassment; (3) the harassment was based on

a protected characteristic of the plaintiff; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassing behavior, but failed to take proper action to alleviate it." (Pet. App. A18-A19 (citing *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005)).) In analyzing the fourth element of this claim – that the harassment affected a term, condition, or privilege of employment – Arraleh argues that the "severe and pervasive" standard articulated in this case, and in some other Eighth Circuit cases, conflicts with Supreme Court precedent establishing a "severe or pervasive" standard. (Pet. 16-17.)

This argument selectively removes a single phrase from the context in which it was applied, wholly ignoring the comprehensive legal analysis performed by the lower court. When this analysis is actually examined, it is clear the Eighth Circuit correctly applied the proper legal standard to the facts of this case. Moreover, even if the wrong standard was applied in analyzing the fourth element, the Eighth Circuit held that Arraleh also failed to present sufficient evidence under the fifth element – that the employer knew of, and failed to adequately respond to, the harassment. Therefore, Supreme Court review of this issue is not warranted.

A. Any Misstatement of the Hostile Work Environment Standard Is Inconsequential Because the Lower Courts Applied the Proper Legal Analysis.

In *Harris v. Forklift Sys., Inc.*, this Court held that discriminatory conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment"

violates Title VII. 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In applying this standard, a court must examine the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Arraleh correctly states that, in analyzing whether the evidence in this case was sufficient to establish a triable issue of fact on his hostile work environment claim, the Eighth Circuit stated that conduct "must be severe and pervasive, both objectively and subjectively."[2] (Pet. App. A19.) The present Petition, however, completely ignores the very next sentence of the Eighth Circuit's opinion, in which the court restated – word-for-word – the totality of the circumstances analysis enunciated by this Court in *Harris*. In concluding that Arraleh failed to provide sufficient evidence to survive summary judgment, the Eighth Circuit analyzed many of these factors – finding that the evidence in the record suggests that many of the alleged comments were unrelated to Arraleh's race or national origin, that many of the comments were not made around or about Arraleh, and that the comments did not interfere with his job performance.

Thus, even if the Eighth Circuit – like Arraleh in his briefs to the lower courts – misstated the overarching standard, the legal analysis actually applied by the court

[2] In both his briefs to the district court and to the Eighth Circuit, Arraleh quoted the very same "severe and pervasive" standard that he now argues is in need of Supreme Court review to correct.

properly considered the totality of the circumstances as required by this Court's precedent.

B. Even if the Lower Courts Improperly Required Conduct Be "Severe and Pervasive," a Writ of Certiorari Is Inappropriate Because the Eighth Circuit Also Found for Defendants on Alternative Grounds.

Beyond holding that Arraleh failed to present evidence that the conduct in this case affected a term, condition, or privilege of his employment, the Eighth Circuit held that Arraleh also "did not provide evidence that the County failed to respond to the harassment in a 'prompt and effective manner.'" (Pet. App. A20-A21.) Arraleh does not seek review of this alternative holding in this Petition. Thus, even if this Court were to find error in the lower courts' analysis of the "term, condition, or privilege" element of the hostile work environment claim, Defendants would remain entitled to summary judgment. Accordingly, there is no outcome-determinative controversy requiring this Court's consideration.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue in this case and the judgment of the Eighth Circuit should be affirmed without further proceedings or delay.

Respectfully submitted,

SUSAN GAERTNER
Ramsey County Attorney

THOMAS E. RING
Assistant County Attorney
50 West Kellogg Blvd.
Suite 560
Saint Paul, MN 55102
(651) 266-3222
Counsel for Respondents